HON'BLE THE ACTING CHIEF JUSTICE
SRI PINAKI CHANDRA GHOSE

WRIT PETITION No.8361 OF 1995

8th November, 2012

Between:

The Port of Kakinada Harbour
Crafts Pool (Regd.) Kakinada,
Represented by its Secretary,
D. Mohan Rao. … Petitioner

And

The State of A.P.,
Represented by its Secretary,
Transport, Roads and Buildings,
(Ports) Department, Hyderabad
and others. … Respondents

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ORDER:

In exercise of the powers conferred by clause (jj) of sub-section (1) of Section 6 read with sub-section (1) of Section 35 of the Indian Ports Act, 1908 (for short, 'the Ports Act'), the Government of Andhra Pradesh issued G.O.Ms.No.257, Transport, Roads and Buildings (Ports) Department, dated 15.12.1993, directing that fees be charged for the services rendered to vessels for berthing of wharves and jetties and also for plying in bar channel and commercial channel for carriage of goods passengers and fresh water from shore to ship and vice-versa under the nomenclature "Berthing and Bar Channel Fees" at the Port of Kakinada in East Godavari District. Aggrieved by the same, the present writ petition has been filed by petitioner The Port of Kakinada Harbour Crafts Pool (Regd.).

2) It is the case of the petitioner that Kakinada Port has been an anchorage port due to its geographical location, in that, all the ships engaged in import/export trade arriving at the port are berthed in the sea at a distance of about five miles from the shore. Loading or unloading of cargo into or from the ships is carried out only at the anchorage point in the sea. All the imported cargo is loaded into the cargo boats at the anchorage point and unloaded at the jetties or wharves. These cargo boats are non-mechanised wooden boats owned by private individuals and are hired by the C & F agents/shippers. Similarly, the export cargo is loaded into these boats at the jetties/wharves, carried along side the ship and loaded into the ship. The jetties/wharves at the shore are provided by the Port Department by collecting charges from the C & F agents/shippers for stacking the cargo. The petitioner Pool, which is registered under the Societies Registration Act, regulates and controls the allotment of boats for carriage of cargo as per the requirements of the C & F agents/shippers.

3) It is the further case of the petitioner that the carrying capacity of the boats vary between 40 M.T. to 200 M.T. and the same is determined by the Port Authority. The boats are constructed, maintained and operated in accordance with the provisions of the A.P. Harbour Crafts Rules, 1980 and the Indian Ports Act, 1908. Every boat owner is required to pay to the Department, fees of Rs.1000/- towards change of tindal, use of port launch for towing, use of crane etc., and an amount of Rs.500/- towards recurring statutory requirements.

4) While so, the State Government published a draft notification proposing to levy a fee called 'berthing and bar channel fees' at the rates specified in the schedule appended to the said notification for the services rendered to vessels for berthing at wharves and jetties and for plying in bar channel and commercial channel for carriage of goods, passengers etc. The said draft notification was issued in purported exercise of power under Section 35(1) read with Clause (jj) of sub-section (1) of Section 6 of the Ports Act. The draft notification appears to have been published in the District Gazette on 15.1.1993 calling for objections and suggestions. The petitioner states that it had made a representation on 22.2.1993 stating that the boats are non-mechanised and manually operated and requested for withdrawal of the proposed levy of fees, but no action had been taken and the impugned G.O. has been issued on 15.12.1993. Hence, the writ petition.

5) A counter affidavit has been filed by respondent No.3 *inter alia* stating that the Government is spending considerable amount for maintaining the canal and approach channel to navigable depths for free movement of cargo boats and dredging is being carried out regularly and thus the financial burden on the State exchequer is increasing year after year. It is stated that each boat owner has to pay not more than Rs.350/- per annum as licence/renewal fee to the department and no other charges as mentioned in the petition are paid by the boat owners. An amount of Rs.44.55p. per ton is being charged by the boat owner from the C&F agents for transporting the cargo and

on an average the boat owner earns Rs.4,27,680/- per annum and this amount is shared between the boat owner and crew at the ratio of 50:50. The hire charges are fixed biannually with mutual negotiations between the boat owners, C&F agents and the boat crew with the approval of the Government taking into consideration the overall increase in the maintenance charges, overhead charges and the cost of living. As such, payment of Rs.9,600/- per annum towards bar channel fees to the Government is comparatively low. It is further stated that the Government is empowered to fix the rates for berthing vessels along side wharves/jetties and charge fee as per Clause (jj) of sub-section (1) of Section 6 of the Ports Act. In terms of Section 6 of the said Act, a draft notification was issued by the Government calling for objections and after considering the objections, final notification was issued vide G.O.Ms.No.257, dated 15.12.1993. It is further stated that laying of the rules before the State Legislature is not a condition precedent for issuance of the G.O. and that the same may be placed before the State Legislature at appropriate time.

6) An additional counter affidavit has been filed by the respondents on 31.7.2006. It is stated that wooden cargo boats have been phased out by December, 1999 and since then steel barges are being operated for carrying the cargo. The owners of the barges hire the same to C & F agents and get an income of Rs.7,56,000/- per annum towards their share.

7) A reply affidavit has been filed by the petitioner denying the averments made in the counter affidavit.

8) Learned counsel for the petitioner contended that the impugned G.O. is not valid in law. The State Government has no authority to frame rules by passing an administrative order. No opportunity of hearing was given to the petitioner on the objections submitted by them pursuant to the draft notification. The mandatory procedure prescribed under Section 6(2-A) of the Act has not been followed and the impugned G.O. had been issued imposing the fees

with immediate effect. The learned counsel further contended that the Government is not rendering any service and instead of providing assistance, they are charging the fees. The owners of the boats are not in a position to bear the burden as the income is very less. The impugned G.O. had been issued in respect of Kakinada Port only, thus, it is discriminatory. The learned counsel also contended that the berthing and bar channel fees is not contemplated under Section 6(jj) of the Act and it is beyond the competence of the State Government to impose such fees. Further, the words "regulating the use of piers, jetties……..." used in Section 6(1)(jj) should be understood to mean regulating the traffic only. The impugned rules were also not placed before the State Legislature as required under Section 6(2A) of the Ports Act. In support of the contention that an opportunity of hearing was required to be given before issuing the final notification, the learned counsel placed reliance on the judgment of the Supreme Court in **Scheduled Caste and Weaker Section Welfare Association (Regd.) v. State of Karnataka**[1].

9) Refuting the contentions made by the learned counsel for the petitioner, learned Government Pleader for Transport submitted that Kakinada is an anchorage port and keeping in view the expenditure for maintaining the port, berthing and bar channel fee is charged. Under Section 35 of the Ports Act, the Government is empowered to impose the berthing and bar channel fees for the services rendered to the vessels at such rates as the Government deems fit, and under Section 6(1)(jj), the State Government may make rules for fixing rates to be paid for use of the piers, jetties, landing places, wharves etc. The Government considered the objections of the petitioner and then only issued the final notification. However, when a subordinate legislative agency like the State Government imposes any fee or charge, the affected parties need not be heard if the Government considers it necessary in public interest so to do. Therefore, there is no illegality in issuing G.O.Ms.No.257, dated 15.12.1993. He further

submitted that laying down the rules before the State Legislature is only directory and not mandatory. In support of his contentions, the learned Government Pleader has relied on the judgments of the Supreme Court in **Atlas Cycle Industries Ltd. v. State of Haryana**[2], **V.S. Dempo & Co. Pvt. Ltd. v. Board of Trustees**[3], **Visakhapatnam Port Trust v. Ram Bahadur Thakur Pvt. Ltd.**[4] and **Prohibition & Excise Supdt. V. Toddy Tappers Co-op. Society**[5].

10) In view of the contentions on behalf of both the learned counsel, the question that arises for consideration is whether the Government is empowered to impose the berthing and bar channel fee. Section 35 of the Ports Act, which is relevant for the purpose, reads as under:

> **"35. Fees for pilotage and certain other services-** (1) Within any port subject to this Act, fees may be charged for pilotage, hauling, mooring, re-mooring, booking, measuring and other services rendered to vessels, at such rates as the Government may direct.
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> (2) The fees now chargeable for such services shall continue to be chargeable unless and until they are altered in exercise of the power conferred by sub-section (1).
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> (3) The Government may, in special cases, remit the whole or any portion of the fees chargeable under sub-section (1) or sub-section (2)."

11) Section 6(1)(jj) of the Ports Act is as follows:

> "**6. Power to make port-rules**.- (1) The Government may, in addition to any rules which it may make under any other enactment for the time being in force, make such rules consistent with this Act, as it thinks necessary for any of the following purposes, namely :-
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> xxxxx
>
> xxxxx
>
> (jj) for regulating the use of piers, jetties, landing places, wharves, quarys, warehouses and sheds when belonging to the Government and for fixing the rates to be paid for the use of the same;"

12) A conjoint reading of the above provisions makes it clear that the Government is empowered to charge fees for pilotage, hauling, mooring, re-mooring, hooking, measuring and other services rendered to vessels at such rates as the Government may direct. In my view, the words “other services rendered to vessels” used in Section 35 takes in its fold the berthing and bar channel fees also. Under Section 6(1)(jj), the Government may make rules for regulating the use of piers, jetties, wharves etc. and for fixing the rates to be paid for use of the same. Thus, there is no merit in the contention of the learned counsel for the petitioner that this fee is not contemplated in the Ports Act. Further, the impugned G.O. is an administrative order imposing berthing and bar channel fee for the services rendered to vessels for berthing at wharves and jetties etc. and no specific rules were made in this regard. According to Section 6(2) of the Ports Act, previous publication of the rules has to be made. In this case, though the impugned G.O. is an administrative order and not in the nature of rules, a draft notification was issued by the Government vide G.O.Rt.No.1242, Transport, Roads & Buildings Department, dated 28.12.1992 and it was published in East Godavari District Gazette on 15.1.1993 calling for objections. The said Gazette notification was also brought to the notice of the cargo boat owners through a Circular dated 15.2.1993 by the third respondent. Thereafter, the petitioner submitted their representation to the Government and the Hon’ble Minister for Ports. On considering the same, the Government issued final notification vide the impugned G.O. This averment made in the counter affidavit filed on behalf of the respondents has not been rebutted by the petitioner in the reply filed by it. Therefore, it cannot be said that no opportunity of hearing was given to the petitioner.

13) Section 6(2A) of the Ports Act provides that every rule made by the State Government under this Act shall be laid as soon as may be after it is made before the State Legislature. However, there is nothing in the section to indicate that the rule is invalid if it is not placed before

the State Legislature. Therefore, the condition of laying of the rule before the State Legislature is only directory and not mandatory and failure to do so does not affect the validity of the rule. In this connection, I may refer to the judgment of the Supreme Court in **Atlas Cycle Industries Ltd.** In that case, the Supreme Court was considering the question whether the requirement of laying before both the Houses of Parliament of any order under Section 3(6) of the Essential Commodities Act, 1955 is only directory and not mandatory. While holding that the said requirement is only directory, the Supreme Court observed thus:

> "S. 3(6) of the Act merely provides that every order made under section 3 by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be after it is made. It does not provide that it shall be subject to the negative or the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made under section 3 of the Act. It does not even say that it shall be subject to any modification which either House of Parliament may in its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for non-observance of or noncompliance with the direction as to the laying of the order before both Houses of Parliament. It would also be noticed that the requirement as to the laying of the order before both Houses of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, it can be held that the requirement as to laying contained in sub-section (6) of Section 3 of the Act falls within the first category i.e. "simple laying" and is directory, not mandatory."

14) The judgment in **Atlas Cycle Industries Ltd.** was relied on by the Supreme Court in **Prohibition & Excuse Supdt. v. Toddy Tappers Coop. Society**. In the said case, the Supreme Court was considering the question whether laying down of a subordinate

legislation before both Houses of the Legislature is directory or mandatory. The following observations are relevant and need to be noted:

> "Laying down of a subordinate legislation before both Houses of the Legislature is directory in nature. Sub-section (3) of Section 72 of the Act merely provides for laying down the rules before both the houses of the legislature with the reasons for giving a retrospective effect. The said provision does not speak of the necessity to obtain permission or prior approval therefor by the houses of the Legislature. Only in the event the Legislature is not satisfied with the sufficiency or otherwise of the reasons assigned, it may direct that the same would operate prospectively. Sub-sections (3) and (4) of Section 72 must be read in such a manner that both may be given effect to. Sub-section (3) deals with only a special situation, whereas sub-section (4) is general in nature. In the event, a negative resolution is adopted the Rules will cease to have the force of law. Difference between sub-sections (3) and (4) of Section 72 lies in the fact that whereas in case the rule is given retrospectivity, the members of both the houses of the Legislature shall be apprised of the reasons therefor, whereas in case of the rule which is prospective in nature, simple laying down before both the Houses would serve the statutory object."

15) In view of the above, I see no merit in the writ petition and hold that the impugned G.O. is valid and the Government is empowered to collect the berthing and bar channel fee at such rates as it directs from time to time. The writ petition is devoid of merits and is accordingly dismissed. No costs.

PINAKI CHANDRA GHOSE, ACJ

8th November, 2012.

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[1] **(1991) 2 SCC 604**

[2] **AIR 1979 SC 1149**

[3] 1994 Supp (2) SCC 349

[4] (1997) 4 SCC 582

[5] (2003) 12 SCC 738